Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, and RALPH SAUNDERS,

Petitioners,

v.

THE NCR CORPORATION,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. _____

HUBERT MORELOCK, et al Petitioners,

v.

THE NCR CORPORATION, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioners, Hubert Morelock, Eugene F. Borgerding, William O. Evans, Clayton Metcalf and Ralph B. Saunders pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit, entered in this case on December 20, 1976.

REPORTS OF THE OPINIONS IN THE COURTS BELOW

The opinion of the Court of Appeals has been reported at 546 F. 2d 682 and appears in the Appendix, infra App. 2a to App. 12a.[1] The decisions of the District Court for the Southern District of Ohio have not been reported, but appear in the Appendix, infra App. 13a to 17a.

[1] "App." refers to the appendix to this petition; "R" refers to the joint Appendix filed in the Court of Appeals.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on December 20, 1976. A timely petition for rehearing was denied by the Court of Appeals on May 17th, 1977 despite the filing of a Brief for the Secretary of Labor as Amicus Curiae in Support of the Petition for Rehearing. This petition for certiorari was filed within the 90 day period following May 17th, 1977. This Court's jurisdiction is invoked under 28 U.S.C. sec. 1254 (1).

QUESTIONS PRESENTED

Whether, despite the joinder of equitable claims for relief within his complaint, an individual plaintiff-employee alleging a violation of the Age Discrimination in Employment Act is entitled to trial by jury on the legal claims presented and all fact issues common to the determination of both legal and equitable claims:

a. whether by reason of discernible Congressional intention in adopting the Age Discrimination in Employment Act, or

b. by reason of the supervening Constitutional-Seventh Amendment guarantee of jury determination of liability and damage issues analagous to those known at common law.

CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

The Seventh Amendment to the Constitution of the United States provides:

> "In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any court of the United States, than according to the rules of the common law."

Section 7(b) of the Age Discrimination in Employment Act, 29 US.C. sec. 626(b) provides:

> "The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in section 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: Provided, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.

Section 7(c) of the Age Discrimination in Employment Act, 29 U.S.C. sec. 626(c) provides:

> "Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: Provided, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter."

STATEMENT OF THE CASE

The basis for federal jurisdiction in the court of first instance, the U.S. District Court for the Southern District of Ohio, was the existence of questions which arose under a law relating to interstate commerce, the ADEA.

These actions were brought under the Age Discrimination in Employment Act 29 USC, sec. 621 et. seq., by five employees to recover as individually applicable, lost wages, damages for mental anguish and personal injuries sustained, punitive damages, liquidated damages, injunctive relief, reinstatement, attorney fees, and costs.

The first stage of the bi-furcated trial concluded when individual verdicts were returned by the jury on the fifth day of trial, finding the sole submitted issue of age discrimination liability against the petitioners' common employer.

The Trial Court thereafter overturned the jury's five verdicts of liability and granted the defendant-employer both judgment notwithstanding the verdicts and conditional order of new trial in the event the judgment N.O.V. were not sustained on appeal (App. 13a-15a). The Trial Court declined to enter its findings of fact and conclusions of law.

The Court of Appeals in substance affirmed the judgment N.O.V. by declaring the jury verdicts of no consequence as being the work of an "advisory jury" only, decreeing the issues which were tried in the case to have been "equitable in nature, directly analagous to the equitable issues pursued in actions under 29 USC sec. 217 and 42 USC sec. 2000e-5, and not suitable for trial by jury". (App. 11a)

Remand was ordered to the District Court for findings of fact and conclusions of law.[2]

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[2] An order staying the issuance of the mandate was made July 25, 1977 pending the filing of the certiorari petition, record and brief.

By 1971, each of the Petitioners were long term employees of the respondent employer, each having worked at NCR in excess of 20 years, each being over 40 years of age and under age 65.

The Petitioners were classified by their employer immediately prior to the complained-of discrimination as "Senior Development Electronic Technicians" and all were employed at the Dayton, Ohio plant.

The petitioners were part of the "office and technical" group which ceased to have any recognized bargaining agent following decertification of the former independent union in August 1971.

Employment levels at the Dayton plant fell drastically during the years 1972, 1973 and 1974, from a high of 22,000 in 1971 to a low of approximately 5,000 in 1975. This reduction in the company's Dayton work force was occasioned in part as result of the implementation of a "plan of decentralization" adopted in the mid 1960's and in part as result of a transition in its product lines from the largely mechanical business machines and cash registers of the past to the more purely "electronic" machines of the present.

The classification of the development electronic technicians was bisected in the year 1965 whereby two classes were created in place of the previously existing single classification, i.e. the higher skilled "senior" technicians and the lesser skilled development technicians, or colloquially the "junior" techs. That 1965 division into two classes was then largely insignificant in terms of the employment opportunities extended to the older technicians by virtue of company rules in the seniority scheme whereunder a senior technician displaced by a work force reduction could go back to his former classification and former work position as a junior electronic technician.

In 1968 that latter provision of the seniority package was eliminated thereby serving to completely isolate the older

group of electronic technicians from the employment opportunities extended to the younger group in the event of a work force reduction.

In 1971, of the 43 Senior Development Electronic Technicians, 25 were over age 40, while only 3 of the 29 junior techs had then attained age 40. The "seniors" were on average a full 10 years older than their "junior" counterparts. (R. 234, 339-341, 495)

Despite the Company emphasis upon electronics, the 1972-1973 implementation of the reduction in the work force was witnessed by an obvious management preference to jettison the older electronic technicians and retain the younger, less proficient electronic technicians. Over the 1971-1974 period, 38 of the 43 original senior technicians were eliminated while only 9 of the original 29 "juniors" suffered a similar fate.

	Senior Techs	Junior Techs
1971	43	29
1974	5	20

The Company-adopted job descriptions for the two classifications throughout this time period required identical functions to be carried out by both groups with the *"seniors"* required to possess *more proficiency,* and *more creativity* than the "juniors". (R. 220-227)

At trial, the Director of Industrial Relations for the Financial Systems Division acknowledged his previously stated explanation for this segregation of the older electronic technicians apart from the younger electronic technicians because the junior technicians . . . .

> ". . . . would reflect a *new* expertise, a *new skill,* related but *new,* and a *new* technology *which the senior could not be expected to have.*" (R. 598)

The Vice President of Industrial Relations justified a separate but concurrent management practice of special scrutiny given workers upon attaining 62 years of age, in these words:

> ". . . . if because of his age or for some other reason his competency is decreasing." (R. 561-566)

While younger technicians continued work as development electronic technicians, the segregated older electronic technicians "who could not be expected to have new skills" (R. 598) either joined the ranks of the unemployed or as in the instance of petitioners Morelock, Saunders and Borgerding, were assigned to humiliating and demeaning clerical tasks, totally unrelated to their extensive training and acknowledged expertise in electronic product development.

REASONS FOR GRANTING THE WRIT

1. CONFLICT AMONG THE CIRCUIT COURTS

This Sixth Circuit decision is in direct conflict with the decisions of the Third and Fourth Circuit Courts of Appeal on the same matter.[3]

The fact of the conflict among the Circuit Courts on this question has now been acknowledged by this Court in that Writ of Certiorari was issued to the Fourth Circuit in *Pons* v. *Lorillard* because of the conflict of that decision with this Sixth Circuit decision of *Morelock* v. *NCR.*[4]

A concurring opinion in the February 1977 Fourth Circuit decision expressly acknowledged the fact of the split between the Circuits.

---

[3] Oral argument was completed April 20, 1977 in the Fifth Circuit on this same jury trial issue. *Am. Motors Sales Corp.* v. *Murphy et al* #76-2718, 76-2772.

[4] Certiorari granted sub nom *Lorillard* v. *Pons,* 45 U.S. Law Week 3840, #76-1346, June 27, 1977.

"Although the Sixth Circuit has reached a contrary conclusion, I concur in my brothers' ruling the statute (ADEA) incorporates the provisions for a jury trial. . . ."

Pons v. *Lorillard*
549 F. 2d 950
(C.A. 4th Feb. 2, 1977)

The majority opinion in this 4th Circuit decision found the ADEA to meet all three of the "*Ross*" tests and therefore, trial by jury required under the Seventh Amendment while the concurring opinion found no need to resolve the Constitutional issue, finding the statute itself to require trial by jury.[5]

Two weeks prior to the *Pons* decision, the Third Circuit had concluded the parties in that ADEA case were entitled to a jury trial on both statutory and Seventh Amendment grounds.

Rogers v. *Exxon*
(550 F. 2d 834,
C.A. 3rd Jan. 20, 1977)

Meanwhile the District Courts in the Third, Fourth and Sixth Circuits are in form following the conflicting rules of their respective Circuit Courts but in substance delaying and postponing trials on those pending cases awaiting the hoped-for resolution of the conflict by this Supreme Court.

2. AN IMPORTANT QUESTION OF FEDERAL LAW

The Sixth Circuit decision in this case decides an important question of Federal Law which has not been, but should be settled by this Court.

Certiorari was granted in a similar setting where jury had been denied below by the Ninth Circuit:

"because 'Maintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care."

Beacon Theatres v. *Westover*
359 US 500, 501 (1959)
citing *Dimick* v. *Schiedt*
293 US 474, 486

3. THE SIXTH CIRCUIT DECISION WAS DECIDED IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

This Court confirmed in 1974 that statutory rights enacted subsequent to the adoption of the Seventh Amendment enjoy the same right to determination by jury as analagous rights which formed the body of common law.

Curtis v. *Loether,*
415 US 189, 194 (1974)

Rather than acknowledging the separate and independent standing of each asserted claim for relief as well established by this Court's prior decisions[6], construing the Seventh Amendment in the context of multiple claims for relief, the Sixth

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[5] *Pons* v. *Lorillard,* 549 F. 2d 950.

[6] *Dairy Queen* v. *Wood,* 369 U.S. 469; *Ross* v. *Bernhard,* 396 U.S. 1531.

Circuit plainly proceeded to strike an average among the several claims and found that average or "overall" character of the plaintiffs' action to be more equitable than legal in character:

> "Such discretion and power have been important factors in *the characterization of an action* as being equitable in nature. Appellants' action in this case *is basically* for reinstatement and injunctive relief."
>
> *Morelock* v. *NCR*
> 546 F. 2d 682, 689

"Averaged away" were the distinct legal claims of plaintiff Morelock, plaintiff Borgerding and plaintiff Saunders for recovery of lost wages, punitive damages, and damages for pain and suffering, and mental anguish.

In a further clear departure from applicable decisions of this Court, the Sixth Circuit not only averaged the legal claims with the equitable claims and found a resulting blend of claims "basically equitable" in character, but also in the process averaged the purely legal claims of petitioner Morelock with the mixed equitable and legal claims of the remaining four petitioners.

Thus, further lost in the averaging shuffle was the fact of total inapplicability of equitable relief in any form to petitioner Morelock who under the stress imposed by his employer's wrongful acts, had become totally and permanently disabled and unable to return to any gainful employment.

Writ of Certiorari has already issued by this Court to the Fourth Circuit premised upon the conflict in that case of *Pons* v. *Lorillard, supra* with the case sub judice from the Sixth Circuit.

Merely holding the Sixth Circuit case in abeyance pending the conclusion of the Pons case will plainly not serve the interests of judicial economy.

Even in the face of a remand of this case with "instructions to compare", following what we expect to be an affirmance of the *Pons* decision, the Sixth Circuit will predictably persist in its present "no jury" position in that this Court will not have had before it in *"Pons"*, the critical and allegedly distinguishing element present in *"Morelock"*, namely, a prayer for money damages, *joined with multiple claims for equitable relief*.

Under the Sixth Circuit's construction, the Fourth Circuit found the right of jury trial as to lost wages in a vacuum, as if no prayer for injunctive relief had been there joined.[7]

The Third Circuit's *"Rogers"* decision is likewise atypical in that the "to-be-expected" prayer of an older worker aggrieved by his employer's age discrimination was not there presented as Doctor Rogers had died prior to suit. (*Rogers* v. *Exxon* 550 F. 2d 834)

This case meanwhile presents the usual circumstance likely to confront the Courts of this land in the future, wherein restoration of former employment and work position is sought along with a claim for lost wages.

Moreover, this decision would bring to the Court the background, and practical problems inherent in a setting where jury trial on the issue of age discrimination was actually had, whereas *Pons* v. *Lorillard* reached this Court following an "a priori" course wherein no such jury deliberation has as yet transpired.

Thus we submit that this Court's determination of whether the issues in a private action under the ADEA do or do not square with the "juror's practical abilities and limitations" could be markedly facilitated by a concurrent consideration of this case wherein just such issues were in fact submitted to a jury. (See *Ross* v. *Bernhard*, 396 US 531, 538, 1970)

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[7] "Of course no injunctive relief is now considered" *Pons* v. *Lorillard*, 549 F. 2d 950, 951, (cited by the Sixth Circuit in a footnote on the order overruling rehearing in Morelock purportedly showing a lack of conflict between the two circuits. App. 1a)

CONCLUSION

For these reasons, a writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Appendix A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al.,
Plaintiffs-Appellants,

v.

THE NCR CORPORATION,
Defendant-Appellee.

ORDER

(Decided and Filed May 7, 1977)

Before: WEICK and ENGEL, Circuit Judges, and LAMBROS,* District Judge.

This cause is before the Court on Appellants' petition for rehearing and suggestion for rehearing en banc. The Secretary of Labor has joined in this petition as amicus curiae.

No judge of this Court having requested a vote on the suggestion that the petition be considered en banc, and this Court having considered said petition and finding the case at bar to be in accord with the recent cases of *Rogers* v. *Exxon Research and Engineering Co.*, Nos. 76-1114/1115 (3rd Cir. January 20, 1977) and *Pons* v. *Lorillard*, No. 76-1369 (4th Cir. February 2, 1977).[1]

IT IS ORDERED that the petition be, and is, hereby denied.

Entered by order of the Court.

John P. Hehman, Clerk
By Grace Keller, Chief Deputy.

---

* The Honorable Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

[1] Compare Morelock v. NCR Corp., 546 F. 2d 682, 689 nn. 16, 17 with Rogers v. Exxon Research and Engineering Co., supra at 8 and Pons v. Lorillard, supra at 2 n. 3.

Appendix B

No. 75-2220
No. 75-2282

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

HUBERT MORELOCK, et al., *Plaintiffs-Appellants,* v. THE NCR CORPORATION, *Defendant-Appellee.*	ON APPEAL from the United States District Court for the Southern District of Ohio.

Decided and Filed December 20, 1976.

Before: WEICK and ENGLE, Circuit Judges, and LAMBROS,* District Judge.

LAMBROS, District Judge. This is an appeal from an action instituted pursuant to the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621 *et seq.* (1970). Essentially, the complaint charged that the NCR Corporation (NCR) did not maintain a bona fide seniority system[1] at its Dayton, Ohio facilities.

On the ground that this was an equitable action, NCR moved to strike the Appellants' jury demand. The District

* The Honorable Thomas D. Lambros, Judge, United States District Court for the Northern District of Ohio, sitting by designation.

[1] 29 U.S.C. § 623(f) (1970) provides in pertinent part:

> It shall not be unlawful for an employer, employment agency, or labor organization —
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan . . . which is not a subterfuge to evade the purpose of this chapter . . . .

Court overruled this motion and the case was tried to a jury, with a verdict being returned in favor of the Appellants on April 1, 1975. Upon motion by NCR the District Court granted a judgment notwithstanding the verdict and a conditional new trial in favor of NCR.

Appellants appeal from the order of the District Court granting judgment notwithstanding the verdict. NCR cross-appeals as to the propriety of a jury trial in actions brought under the ADEA. For the reasons stated below we find that the District Court erred in overruling NCR's motion to strike the Appellant's jury demand. As this case was properly triable in its entirety in the District Court without a jury, we remand this case for findings of fact and conclusions of law in accordance with Rule 52(a), Fed. R. Civ. P.

In 1938 actions at law and suits in equity were merged into a single "civil action".[2] While this merger abolished the procedural distinction between these actions, the substantive distinctions have been retained for purposes of determining issues triable by jury. *Kennedy* v. *Lakso*, 414 F.2d 1249, 1251 (3rd Cir. 1969). The basic principle remains that a civil action in the nature of an action at law is triable to a jury, while one in the nature of a suit in equity is properly tried to the court. See *Kennedy* v. *Lakso, supra*, at 1251.

As a result of the 1938 merger, the federal courts must often determine the right to a jury trial in actions which present mixed questions of law and equity within the context of a single case. This right, guaranteed by the Seventh Amendment "[i]n suits at common law, where the value in controversy shall exceed twenty dollars", has been preserved[3] and extended to apply to actions enforcing contemporary statutory rights, so long as the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law. See e.g. *Curtis* v. *Loether*, 415 U.S 189, 194 (1974).

[2] Rule 2, Fed. R. Civ. P.

[3] Rule 38, Fed. R. Civ. P.

However, the mere fact that a monetary award is an incident of the relief requested does not mandate that an action be characterized as legal rather than equitable. See e.g., *Curtis* v. *Loether, supra* at 196; *Slack* v. *Havens*, 522 F.2d 1091, 1094 (9th Cir. 1975). In certain actions monetary relief is an integral part of an equitable action to which the Seventh Amendment is inapplicable. See e.g. *Slack* v. *Havens, supra* at 1094; *Wirtz* v. *Jones*, 340 F.2d 901, 904 (5th Cir. 1965). The propriety of jury trials in cases presenting such mixed questions of law and equity is determined by the nature of the issue to be tried. *Ross* v. *Bernhand*, 396 U.S., 531, 538 (1970).

Appellants allege violations of § 623 of the ADEA. This section provides in pertinent part:

> § 623. (a) It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age;
>
> (2) to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age; or
>
> (3) to reduce the wage rate of any employee in order to comply with this chapter.

The applicable enforcement provisions of the ADEA invoked by the Appellants are set forth in § 626:

> § 626. (b) The provisions of this chapter shall be enforced in accordance with the powers, remedies, and procedures provided in sections 211(b), 216 (except for subsection (a) thereof), and 217 of this title, and subsection (c) of this section. Any act prohibited under section 623 of this title shall be deemed to be a prohibited act

> under section 215 of this title. Amounts owing to a person as a result of a violation of this chapter shall be deemed to be unpaid minimum wages or unpaid overtime compensation for purposes of sections 216 and 217 of this title: PROVIDED, That liquidated damages shall be payable only in cases of willful violations of this chapter. In any action brought to enforce this chapter the court shall have jurisdiction to grant such legal or equitable relief as may be appropriate to effectuate the purposes of this chapter, including without limitation, judgments compelling employment, reinstatement or promotion, or enforcing the liability for amounts deemed to be unpaid minimum wages or unpaid overtime compensation under this section. Before instituting any action under this section, the Secretary shall attempt to eliminate the discriminatory practice or practices alleged, and to effect voluntary compliance with the requirements of this chapter through informal methods of conciliation, conference, and persuasion.
>
> (c) Any person aggrieved may bring a civil action in any court of competent jurisdiction for such legal or equitable relief as will effectuate the purposes of this chapter: PROVIDED, That the right of any person to bring such action shall terminate upon the commencement of an action by the Secretary to enforce the right of such employee under this chapter.

Pursuant to these provisions Appellants sought relief from the trial court in the form of reinstatement with back pay and benefits, a preliminary and permanent injunction enjoining NCR from discriminating against any and all of the Appellants because of their age, and compensatory, punitive and liquidated damages.[4] In order to determine the nature of the issue to be tried in this case, and therefore the propriety of a jury trial, it is necessary to evaluate the ADEA, and particularly § 626, in view of the relief requested by the Appellants.

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[4] Two of the five Appellants have never been laid off, demoted or otherwise had their position, or the work performed thereunder, altered.

The ADEA is an offspring of the Civil Rights Act of 1964.[5] Enacted in 1967, the express purpose of the Act is to promote the "employment of older persons based on their ability rather than age" and to prohibit "arbitrary age discrimination".[6] The prohibitions of the ADEA are in terms virtually identical to those of Title VII of the Civil Rights Act of 1964,[7] except that "age" has been substituted for "race, color, religion, sex or national origin." *Hodgson* v. *First Federal Sav. & L. Ass'n of Broward Co., Fla.*, 455 F.2d 818, 820 (5th Cir. 1972). The similarities between Title VII and the ADEA are "hardly accidental", and although it may be inappropriate to simply borrow and apply the standards of Title VII to the ADEA automatically, an analogous application of such standards should not be disregarded. See *Laugesen* v. *Anaconda Co.*, 510 F.2d 307, 311 (6th Cir. 1975). An analysis of the ADEA, therefore, necessarily requires some discussion of Title VII.

The enforcement provisions of Title VII are set forth in 42 USC § 2000e-5. This section provides *inter alia* for a two-tier system of enforcement by which aggrieved individuals initially seek redress through the Equal Employment Opportunities Commission, with the right reserved to proceed in private civil litigation should such individual be dissatisfied with the Commission's efforts. These enforcement provisions are modeled after those of the National Labor Relations Act (NLRA), 29 USC § 160(c) (1970), which has as its objective the vindication of the public interest by making employees whole for losses suffered through unfair labor practices. See *Mims* v. *Wilson*, 514 F.2d 106, 110 (5th Cir. 1975). The provisions of § 2000e-5 have been modified from those of the NLRA in order to permit private civil actions to redress violations of Title VII. However, the basic thrust of Title VII, like the NLRA, is remedial in nature and is directed at the consequences of unfair employment practices. See *Palmer* v. *General Mills, Inc.*, 513 F.2d 1040 (6th Cir. 1975).

[5] See, H.R. Rep. No. 805, 1967 U.S. Code Cong. and Adm. News p. 2213 *et seq.* Also see, S. Rep. No. 872, 1964 U.S. Code Cong. and Adm. News p. 2355, 2408.

[6] 29 USC § 621(b) (1970).

[7] 42 USC § 2000e-1 et seq. (1970)

The function of the Court in dealing with violations of Title VII is provided in 42 USC § 2000e-5(g):

> (g) If the court finds that the respondent has intentionally engaged in or is intentionally engaging in an unlawful employment practice charged in the complaint, the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatemennt or hiring of employees, with or without back pay . . . or any other equitable relief as the court deems appropriate.

Private actions pursuant to this section have been held to be equitable in nature and therefore not triable by jury.[8] See e.g. *McFerren* v. *County Board of Ed. of Fayette Co., Tenn.*, 455 F.2d 199 (6th Cir. 1972); *King* v. *Laborers Internat. U. of No. America, Local 818*, 443 F.2d 273 (6th Cir. 1971). The monetary relief available under this section in the form of back pay is an integral part of the equitable remedy of reinstatement, and is a form of restitution, not damages. See e.g. *E.E.O.C.* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975).

Although the prohibitory provisions of Title VII and the ADEA are in terms identical, the enforcement sections of these acts differ. The enforcement provisions of § 626 of the

[8] In discussion actions pursuant to 42 USC § 2000e-5(g), the United States Supreme Court in *Curtis* v. *Loether, supra* at 267, observed, in dicta, that the language of this section, authorizes an equitable action for reinstatement and back pay, as opposed to an action for damages, which is inappropriate for trial by jury The Supreme Court further noted that this langage committed the decision to award back pay to the discretion of the trial judge, and that such an award in fact constitutes funds wrongfully withheld from the plaintiff. See also *Slack* v. *Havens, supra*.

ADEA essentially follow those of the Fair Labor Standards Act (FLSA).[9] These enforcement provisions replaced those in the original congressional bill, which had provided for enforcement provisions similar to those of the NLRA.[10] The effect of this modification is to allow individuals, as well as the Secretary of Labor, to seek remedies through court action.[11] The applicable provisions of the FLSA are found in 29 USC §§ 216, 217, (1970) which provide in pertinent part:

> § 216. (b) Any employer who violates the provisions of section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained in any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated. . . . The right provided by this subsection to bring an action by or on behalf of any employee, and the right of any employee to become a party plaintiff to any such action, shall terminate upon the filing of a complaint by the Secretary of Labor in an action under Section 217 of this title in which restraint is sought of any further delay in the payment of unpaid minimum wages, or the amount of unpaid overtime compensation.

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[9] 29 USC § 201 et seq. (1970). The enforcement provisions of the ADEA also include subsection (c) of 29 USC § 626.

[10] 29 USC § 160 *et seq.*

[11] See H.R. Rep. No. 805, 1967 U.S. Code Cong. and Adm. News p. 2213, 2218. The legislative history of Title VII and the ADEA demonstrates that although the express enforcement provisions of these acts differ, the provisions of each act originated in the NLRA and were respectively modified in order to permit individuals to seek relief through civil litigation. It has been observed that the primary burden of enforcing equal employment statutes is on the private plaintiff. *Romansanta* v. *United Airlines, Inc.*, 537 F.2d 915 (7th Cir. 1976).

> § 217. The district courts . . . shall have jurisdiction, for cause shown, to restrain violations of section 215 of this title, including in the case of violations of section 215(a)(2) of this title the restraining of any withholding of payment of minimum wages or overtime compensation found by the court to be due to employees under this chapter . . . .

Addressing § 217 initially, actions by the Secretary of Labor pursuant to this section have been held to be equitable in nature and exclusively within the province of the court. e.g. *Paradise Valley Investigation and Patrol Services, Inc.* v. *Dunlop*, 521 F.2d 1342 (9th Cir. 1976); *Geyer Broadcasting Co.* v. *Holder*, 14 Fed. Rules Serv. 2d 621 (7th Cir. 1970); *Sullivan* v. *Wirtz*, 359 F.2d 426 (5th Cir. 1966). The purpose of § 217 is to correct a continuing offense against the public interest by assuring effective and uniform compliance with and adherence to the public policy relating to wage standards set forth in the FLSA. See e.g. *Wirtz* v. *Atlas Roofing Mfg. Co.*, 377 F.2d 112 (5th Cir. 1967); *Wirtz* v. *Jones, supra; Wirtz* v. *Ocala Gas Co.*, 336 F.2d 236 (5th Cir. 1964). The enforcement of a monetary award as an incident to injunctive relief in actions under § 217 is simply a part of the reasonable and effective means of bringing about compliance with the FLSA. *Wirtz* v. *Jones, supra.*

Pursuant to § 216(b) individuals are permitted to proceed in private civil actions to redress violations of the FLSA. Such actions have been characterized as actions at law, and, on proper demand, triable before a jury. See e.g. *Wirtz* v. *Jones, supra.* However, the provisions of § 216(b) must be considered in conjunction with those of 29 USC § 626(c) in order to ascertain the nature of the issues presented in individual actions under the ADEA.[12]. Section 626(c) provides that

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[12] Statutes should not be construed in such a fashion as to render certain provisions superflous or insignificant. *Zeigler Coal Co.* v. *Kleppe*, 536 F.2d 398 (D.C. Cir. 1976).

"[a]ny person may bring a civil action . . . for such legal or equitable relief as will effectuate the purposes of this chapter."

The terms of this section serve to expand the individual's power to proceed in private civil actions beyond that afforded him by § 216(b) of the FLSA. In actions pursuant to § 216(b) individuals are limited to seeking legal remedies and are precluded from obtaining injunctive relief. See *Powell* v. *Washington Post Co.*, 267 F.2d 651 (D.C. Cir. 1959); *Roberg* v *Henry Phipps Estate*, 156 F.2d 958 (2d Cir. 1946); *Bowe* v. *Judson C. Burns, Inc.*, 137 F.2d 37 (3rd Cir. 1943). Section 626(c) gives individuals the right to seek equitable as well as legal relief. Effectively, § 626(c) of the ADEA supplements the provisions of § 216(b) of the FLSA as to permit individuals to seek the same remedies for violations of the ADEA as are available to the Secretary of Labor.[13]

In "any action" involving violation of the ADEA the provisions of 29 USC § 626(b) empower the Court to "grant such legal or equitable relief as . . . appropriate to effectuate the purposes of this chapter, including without limitation . . . employment, reinstatement or promotion, . . . or amounts deemed . . . unpaid minimum wages or unpaid overtime compensation".[14] The scope of power and the degree of discretion vested in the Court by these provisions parallel that provided the Court in actions pursuant to 29 USC § 217 and 42 USC § 2000e-5 Such discretion and power have been important factors in the characterization of an action as being equitable in nature.[15] Appellants' action in this case[16] is

[13] See 29 USC § 217.

[14] The language of 29 USC § 626(b) "such legal or equitable relief as will effectuate the purposes of this chapter" is repeated in 29 USC § 626(c) regarding the remedies available to individuals in actions brought under this section.

[15] See N. 7, *supra*.

[16] The ADEA is not to be applied formalistically, but on a case by case basis. See *Laugesen* v. *Anacanda Co.*, *supra* at 312 n. 4.

basically for reinstatement and injunctive relief. Such an action necessarily invokes the broad powers of the Court and is essentially equitable in nature. The monetary relief sought by the Appellants is the equivalent of funds allegedly wrongfully withheld from them by NCR in the past, and is an integral part of the basic equitable claim for reinstatement. Accordingly, the issues to be tried in this case are equitable in nature, directly analagous to the equitable issues pursued in actions under 29 USC § 217 and 42 USC § 2000e-5, and not suitable for trial by jury.[17]

As no constitutional right to a jury trial existed in this action, the jury impaneled by the District Court was, in effect, an advisory one. *Hyde Properties* v. *McCoy*, 507 F.2d 301 (6th Cir. 1974).[18] When an advisory jury is used, the ultimate responsibility for findings of fact and conclusions of law remains with the district court. See *Hyde Properties* v. *McCoy*, *supra*; *Frostie Co.* v. *Dr. Pepper Co.*, 361 F.2d 124 (5th Cir. 1966); *Mallory* v. *Citizens Utility Co.*, 342 F.2d 796 (2d Cir. 1965). Where the district court fails to provide findings of fact and conclusions of law, the proper procedure

[17] The right to trial by jury in which an individual seeks purely legal damages under the ADEA is not before the Court in this case. It has been held that in such a situation the individual is entitled to a jury trial. *Chilton* v. *NCR Co.*, 370 F.Supp. 660 (S.D. Ohio 1974). We note, however, that the *Chilton* case did not consider either the ADEA's close similarity with Title VII or the import of 29 USC § 626(c). See *Laugesen* v. *Anaconda Co.*, *supra* at 312 n. 12.

[18] After the decision in the *Hyde Properties* v. *McCoy* case had been circulated and approved by the three judges constituting the panel, the Court was notified through the Clerk that the parties were engaged in efforts to settle their differences. At that time, however, the Clerk had not received a formal notification of settlement from the parties. In the absence of such notification the opinion of the Court was forwarded to the printer for publication. Subsequent to that time, but before the release of the printed opinion, the Court received formal notification of settlement from the parties. Accordingly, the *Hyde Properties* v. *McCoy* does not have full precedential effect before this Court. However, we find it persuasive in the instant case.

is to vacate the judgment and remand the case for such findings. *Armstrong* v. *Collier*, 436 F.2d 72, 77 (5th Cir. 1976).[19] Accordingly, we remand this case to the District Court for findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P.[20]

---

[19] It is well settled that Rule 52(a), Fed. R. Civ. P., is not a jurisdictional requirement for appeal, and that where there is a sufficient basis for the appellate court to consider the merits of the case remand is not required. See *King* v. *Commissioner of Internal Revenue*, 458 F.2d 245, 249 (6th Cir. 1972); *Armstrong* v. *Collier*, *supra* at 77. However, remand is particularly appropriate in the case at bar. This case involves a very complex seniority system which was the result of many years of collective bargaining experience. In evaluating cases presenting such seniority systems the courts must look beyond what may be facially neutral policies and view such systems in light of their effect in operation, not in the abstract. cf. *Laugesen* v. *Anaconda Co.*, *supra*. See *EEOC* v. *Detroit Edison Co.*, 515 F.2d 301 (6th Cir. 1975); *Jersey Central Power & Light Co.* v. *Local Unions of Intern. Broth. of Elec. Workers*, 508 F.2d 687 (3rd Cir. 1975). Findings of fact and conclusions of law are appropriate in such cases not only to assist the trial court in the adjudicatory process, but also to assist the appellate court in reviewing such complex evaluations.

[20] In view of the disposition of this case we find it unnecessary to address the remaining issues presented by this appeal.

Appendix C

UNITED STATES RISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-74-29

HUBERT MORELOCK, et al.,
Plaintiffs,

v.

THE NCR CORPORATION,
Defendant.

JUDGMENT

(Filed 4-16-75)

This action came on for trial before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the defendant, National Cash Register Company, motion for judgment non obstante veredicto and motion for a new trial is hereby GRANTED. The motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

The plaintiffs take nothing, that the action be dismissed on the merits.

Dated at Dayton, Ohio, this 16th day of April, 1975.

John D. Lyter,
Clerk of Court
By Rebecca Jane Ellis

Appendix D

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. C-3-74-29

HUBERT MORELOCK, ET AL.,
Plaintiffs,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant.

ORDER GRANTING MOTION FOR JUDGMENT NON OBSTANTE VEREDICTO AND MOTION FOR A NEW TRIAL

(Filed 4-16-75)

This matter is before the Court following trial on the issue of liability to a jury and upon motion by defendant properly made for judgment non obstante veredicto and for a new trial.

The standard of inquiry in this circuit is the "substantial evidence" rule. *Solomon* v. *United States,* 276 F.2d 669 (6th Cir. 1960); *Hinton* v. *Dixie-Ohio Express Co.,* 181 F.2d 121 (6th Cir.); *Scott* v. *United States,* 161 F.2d 1009 (6th Cir.)

It is clear from the above authorities that the motions must be overruled unless viewing the evidence in the light most favorable to the plaintiff there would be no substantial evidence to support a jury verdict.

A consideration of the evidence presented indicated that three of the plaintiffs, Hubert Morelock, Eugene Borgerding,

and Ralph Saunders, were reduced in grade in reverse order of seniority during a reduction in force at defendant's plant. Plaintiffs Clayton Metcalf and William Evans were never reduced in rank. No substantial evidence, in this Court's opinion, was presented supporting plaintiffs' contentions of a violation of the Age Discrimination in Employment Act, 29 U.S.C. Sec. 621 et seq. There being a lack of substantial evidence, the motion for judgment non obstante veredicto is hereby GRANTED.

Defendant seeks also a new trial, urging that irrelevant and immaterial evidence and testimony was presented through defendant witness Thomas Nesbitt. A consideration of Mr. Nesbitt's testimony and Plaintiffs' Exhibit 22 leads to the conclusion that such testimony and exhibit were improperly admitted to the prejudice of defendant. Accordingly, defendant's motion for a new trial is likewise GRANTED.

The procedure to be followed in a determination of this sort may be found in Rule 50(c) of the Federal Rules of Civil Procedure. Accordingly, the motion for a new trial is granted conditioned upon the vacation or reversal of this Court's order granting the motion for judgment non obstante veredicto.

IT IS SO ORDERED.

Carl B. Rubin
United States District Judge

Appendix E

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO

Civil Action File No. C-3-74-29

HUBERT MORELOCK, et al.,
Plaintiffs,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant.

JUDGMENT

(Filed 8-13-74)

This action came on for hearing before the Court, Honorable Carl B. Rubin, United States District Judge, presiding, and the issues having been duly heard and a decision having been duly rendered.

It is Ordered and Adjudged that the motion of Defendant, The National Cash Register Company, to strike the jury demand from the plaintiffs' complaint is hereby DENIED.

Dated at Dayton, Ohio, this 13th day of August, 1974.

John D. Lyter
Clerk of Court
By Rebecca J. Ellis

Appendix F

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Civil Action File No. C-3-74-29

HUBERT MORELOCK, et al.,
Plaintiffs,

v.

NATIONAL CASH REGISTER COMPANY,
Defendant.

ORDER

(Filed 8-13-74)

This matter comes before the Court upon the motion of the defendant, The National Cash Register Company, to strike the jury demand from the plaintiffs' complaint. This action arises under the Age Discrimination in Employment Act, 29 U.S.C. sec. 621, and the Court has previously considered this question in *Chilton* v. *The National Cash Register Company*, 370 F. Supp. 660 (1973). The defendant has not convinced the Court that decision was erroneous.

Accordingly, for the reasons set forth in *Chilton* v. *National Cash Register Company, supra*, the motion is DENIED.

It is so ORDERED.

Carl B. Rubin
United States District Judge

Supreme Court, U. S.
FILED
AUG 26 1977
MICHAEL RODAK, JR., CLERK

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, ET AL.,
Petitioners,

vs.

THE NCR CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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In The

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THE NCR CORPORATION,

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BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Respondent, NCR Corporation, respectfully urges that the Petition for a Writ of Certiorari filed herein be denied.

COUNTERSTATEMENT OF THE QUESTION PRESENTED

Are the Petitioners, in a privately brought action arising under the Age Discrimination in Employment Act, entitled as a matter of right to a trial by jury?

COUNTERSTATEMENT OF THE CASE

The Petitioners are and were Development Technician employees of the Respondent, working at Respondent's Dayton, Ohio, facilities. Petitioners were initially members of a collective bargaining unit represented for purposes of collective bargaining by a labor organization pursuant to the provisions of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. Sections 141, et seq.

Initially, these Development Technician employees were in an "all employee" bargaining unit. On September 1, 1964, the National Labor Relations Board divided this "all employee" unit into two separate and distinct bargaining units — an "office and technical" employees bargaining unit, and a "production and maintenance" employees bargaining unit. Petitioners became part of the office and technical employees unit and continued to be represented by the same labor organization which had represented them prior to the establishment of the two bargaining units. As a result of the 1964 collective bargaining negotiations with this labor organization, the new vocation (a collection of related job classifications) of Development Technician was established in the collective bargaining agreement. Then, pursuant to a National Labor Relations Board election on September 10, 1971, this labor organization was decertified.

Following September 10, 1971, the employees in the office and technical employees bargaining unit were not represented by any labor organization. Respondent issued and implemented a "Handbook for Office and Technical Personnel" in place of the expired collective bargaining agreement. This Handbook contained provisions which encompassed various personnel policies applicable to Petitioners, including such items as seniority, transfer, promotion, reduction in force, recall and separation. The seniority

system provided in the Handbook was identical in terms and application to the seniority system which had evolved through negotiations during the period when office and technical employees were represented by a labor organization.

In administering this seniority system, the Respondent maintained seniority records for each employee and each job vocation within the office and technical employees unit. The employees' seniority listings were not maintained on any basis related to the age of an individual, and the age or the birth date of any individual was not recorded on the seniority listing. Clearly, the vocational seniority system was premised upon service both with the Respondent and in the vocation, and was not based on the chronological age of the individual. Neither the Development Technician vocation nor the vocational seniority system was developed with any consideration whatsoever given to the age of the employees. In point of fact, two of the Petitioners were over age 40, and three of the Petitioners were under age 40 at the time they initially entered the Development Technician job vocation, and the same mixture existed in virtually all job vocations.[1]

Under the vocational seniority system which evolved in the course of collective bargaining, and which was continued in effect after September 10, 1971, an individual did not necessarily follow the reverse course of promotion during layoff. The reason for this resulting is that a job vocation encompasses a group of job classifications. However, it is vocational seniority, irrespective of the chronological age, which determines the course of layoff.

Commencing October 13, 1972, lack of work necessitated a reduction in the total work force in the office and techni-

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[1] The only exceptions to this were the vocations with too few employees to indicate a statistically accurate distribution.

cal employees' unit. From that date until June 26, 1973, twenty-one (21) of the Development Technician employees were laid off from that job vocation, including three (3) of the Petitioners. The work to which they were assigned was that work allowed them by their vocational seniority, and was no more or less "demeaning" than that performed by non-Petitioners. On June 26, 1973, there were six (6) individuals remaining in this job vocation. Of the twenty-one (21) individuals laid off from this job vocation, fourteen (14) were, at the time of their layoff, under age 40 and seven (7) were over the age of 40. The reductions which were occurring affected the entire work force of the Respondent's Dayton, Ohio, facilities. For example, in 1970, the total employment at the Dayton facilities was over 21,000. In 1975, at the time of trial in the District Court, there were approximately 5500 employees at the Dayton facilities.

It is likewise uncontroverted that even after these substantial reductions, there were employees both over and under the age of 40 in virtually all vocations. In June, 1973, there were 812 employees in the office and technical employees unit, 379 of whom were over the age of 40, and 433 of whom were under the age of 40. At that time, eleven (11) of the eighteen (18) employees in the Development Technician vocation were over the age of 40.

After the initial Complaint in this matter was filed in the District Court, Respondent filed a Motion to Strike Petitioners' jury demand, which was denied (Appendix E, F to Petitioners' Petition for Writ of Certiorari). Thereafter, the matter was tried to the jury, which returned a verdict for the Petitioners. Respondent filed both a Motion for Judgment *non obstante verdicto* and a Motion for a New Trial, which were granted by the District Court (Appendix C, D to the Petition). The District Court

found, as a matter of law, that no substantial evidence supported the Petitioners' position, and, therefore, granted the Judgment n.o.v. Obviously, the District Court concluded that the vocational seniority system was a *bona fide* seniority system under the Age Discrimination Employment Act. Petitioners appealed on the merits to the Sixth Circuit Court of Appeals, and Respondent cross-appealed on the issue of the Petitioners' right to a jury trial. The Sixth Circuit Court of Appeals determined that no constitutional right to a jury trial existed, and directed the District Court on remand to enter findings of fact and conclusions of law in accordance with Federal Rule of Civil Procedure 52 (a) (Appendix A, B to the Petition).

REASONS FOR DENYING THE WRIT

I. There is no final appealable order.

Rule 19 of this Court's Rules provides that there must be a "final appealable order" prior to invocation of a request to this Court to grant jurisdiction. As stated in *Slaken* v. *O'Connor,* 278 U.S. 61 (1928), the judgment must be final under Rule 19(d). And the face of the Order is the test of its finality, *Gulf Refining Company* v. *U.S.,* 269 U.S. 125 (1925). Specifically, in this matter, the United States Court of Appeals for the Sixth Circuit determined:

> "Accordingly, we remand this case to the District Court for findings of fact and conclusions of law in accordance with Rule 52, Fed. R. Civ. P." 546 F.2d 684, 690.

The Court further declined to decide any of the appealed issues with respect to the merits. Its footnote clearly estab-

lishes that. Also, no "perishable"[2] constitutional issue is involved as a jury trial was already had and Judgment n.o.v. issued. Hence, a reversal and remand does not create a final appealable order.

An order remanding a case for findings of fact and conclusions of law is not a final order because the Record is incomplete until the District Court provides compliance with Rule 52 as directed. Furthermore, there has been no final decision on the merits by the Sixth Circuit. *Wilson* v. *Republic Iron and Steel Company,* 257 U.S. 92 (1921); *U.S.* v. *Krall,* 174 U.S. 385 (1899); *Coe* v. *Armour Fertilizer Works,* 237 U.S. 413 (1915); *Haseltine* v. *Central National Bank,* 183 U.S. 130 (1901); *Smith* v. *Adams,* 130 U.S. 167 (1889); *Rice* v. *Sanger,* 144 U.S. 197 (1892); *Scofield* v. *National Labor Relations Board,* 394 U.S. 423 (1969).

II. There is no merit to a further appeal upon the same basis as other cases already before the Court.

This Court has granted certiorari in *Lorillard* v. *Pons.*[3] The Brief requesting the writ of certiorari in the *Lorillard* case stated that the courts throughout the land were awaiting determination of the jury trial issues with respect to the Age Discrimination in Employment Act, 29 U.S.C. Section 626 (b) and (c). In addition, it was asserted that the *Lorillard* case was in conflict with the decision of the Sixth Circuit Court of Appeals in the instant matter with respect

[2] See, *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.,* 414 U.S. 156 (1973).

[3] Case No. 76-1346, certiorari granted on June 27, 1977, 44 U.S. L. Week 3840.

to the jury trial issue. It is a traditional basis of the discretionary writ of certiorari that the Court decide issues of particular substance only once. As this Court stated in *NLRB* v. *Pittsburgh SS Company,* 340 U.S. 498, 502 (1951):

> "Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrasing conflict of opinion and authority between the Circuit Courts of Appeal.'"

The issues involved herein, in accordance with the request for certiorari made by Petitioners, deal solely with a jury trial under the Age Discrimination in Employment Act, 29 U.S.C. Section 626 (b) and (c). Hence, because the issue is better presented in the *Lorillard* case, there is no necessity in granting a second writ in this case.

III. A question of substance is not presented.

Basically, this Court cannot reach the merits of this case insofar as who wins and who loses. The case was tried to a jury before the District Court, and the jury verdict issued for Petitioners. However, the District Court granted Judgment n.o.v. and entered judgment on behalf of Respondent. The Sixth Circuit Court of Appeals sustained the Respondent's cross-appeal on the issue of the trial by jury and did not consider the merits of this case. Therefore, the substantial issue of who wins and loses and assessment of evidence is not before the Court. *NLRB* v. *Pittsburgh SS Company, supra*; *F.T.C.* v. *American Tobacco Co.,* 274 U.S. 543 (1927).

Whether the Petitioners are entitled to a trial by jury is not relevant to the ultimate outcome of this case. Hence,

issuance of the writ of certiorari herein will be a futile act insofar as the resolution of the merits of this case.

IV. The decision of the Court is not in conflict with the other Circuits.

Because the District Court in this matter tried the case to a jury, it is submited that the decision by the Fourth Circuit Court of Appeals in *Lorillard* v. *Pons* where a jury trial was denied is opposite. This case was decided upon a Judgment n.o.v. and, thus, is not contrary to the *Lorillard* decision.

Similarly, there is no conflict with *Rogers* v. *Exxon,* 550 F.2d 834 (3rd Cir. 1977), as that case dealt with a pension plan as opposed to a seniority system, and was remanded for deletion of the "pain and suffering" issues given to the jury which is the very issue Petitioners seek to tack to their jury issue before this Court. There is no conflict as neither the Sixth nor the Third Circuits allow such consequential damages under violation of the Age Discrimination in Employment Act.

CONCLUSION

For the reasons set forth above, Respondent requests that this Court deny the Petitioners' Petition for a Writ of Certiorai to the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

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Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

No. 77-172

HUBERT MORELOCK, EUGENE BORGERDING, WILLIAM EVANS, CLAYTON METCALF, AND RALPH SAUNDERS,

Petitioners,

vs.

THE NCR CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

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THE NCR CORPORATION,

Respondent.

REPLY BRIEF IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

I. FINALITY

Respondent asserts that Supreme Court Rule 19 requires a "final appealable order" prior to a successful invocation to this Court to grant jurisdiction. It plainly does not so provide. That the rule might have so stated in 1928[1] and 1925[2] is no response to the applicable statement

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[1] *Slaken* v. *O'Connor*, 278 U.S. 61 (1928)

[2] *Gulf Refining Company* v. *U.S.*, 269 U.S. 125 (1925)

of Rule 19 as contained in the current Supreme Court Rules.

Respondent's citation and notions of "no perishable constitutional issue" wherein Writ of Certiorari was sought (and granted) [3] to review the judgment of a state supreme court under 28 U.S.C. sec. 1257 is likewise inapposite to this case wherein review is sought of a federal appellate court's decision, now in conflict with two other Circuit Courts of Appeal.[4]

Moreover, Respondent's own citation of the *North Dakota Pharmacy Board* decision[3], itself provides reference to three separate instances wherein remand for further proceedings below in state court, did not deprive those petions for Certiorari the required "finality" even under 28 U.S.C. sec. 1257[5], which did require "finality".

Of the seven (7) further citations asserted in support of Respondent's "Finality" argument, (Respondent's Brief in Opposition p. 6), none are applicable.

Three of the decisions involve attempted Writs to the State Supreme Courts of Florida[6], Missouri[7], Kansas[8], and a fourth involved an attempted Writ to the then Supreme Court of the Territory of Dakota[9].

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[3] *North Dakota State Board of Pharmacy* v. *Snyders Drug Stores, Inc.*, 414 U.S. 156 (1973)

[4] *Pons* v. *Lorillard*, 549 F. 2d 950 (C.A.4) (certiorari granted 5-27-77), 45 U.S. Law Week 3840; *Rogers* v. *Exxon*, 550 F. 2d 834 (C.A. 3)

[5] *Hudson Distributors, Inc.* v. *Eli Lilly and Co.*, 377 U.S. 386; *Local No. 438* v. *Curry*, 371 U.S. 542; *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555

[6] *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413 (1915)

[7] *Haseltine* v. *Central National Bank*, 183 U.S. 130 (1901)

[8] *Rice* v. *Sanger*, 144 U.S. 197 (1892)

[9] *Smith* v. *Adams*, 130 U.S. 167 (1889)

The fifth involved an attempted direct appeal from a district court under then Section 238 of the Judicial Code.[10]

The sixth citation is to an ancient decision of 1899, when the applicable Supreme Court rule did impose the condition of "finality", this in contrast with present Rule 19, which does not.[11]

The seventh citation involved an issue of timely filing of Petition for Certiorari within the 90 day period, the Court holding that in absence of service of a notice of entry of judgment per Federal Appellate Rule 36, the judgment below was not "final" for purpose of starting the 90 day clock.[12]

II. LORILLARD v. PONS, ALREADY BEFORE THE SUPREME COURT

Petitioners have already asserted several substantive reasons why this case should not be merely held in abeyance but instead accepted either for independent review or for concurrent review and argument with the already accepted *Lorillard* case from the Fourth Circuit.[13]

To these substantive reasons, Respondent makes no reply save the naked assertion that in the *Lorillard* case, . . . "the issue is better presented".

To us, the most telling of the reasons favoring issuance of the Writ lies in the Sixth Circuit's advance announcement made at the time of denying the petition for rehearing, that the Supreme Court's decision in *Lorillard* alone, will not resolve the conflict, viz., that even in the wake

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[10] *Wilson* v. *Republic Iron and Steel Company*, 257 U.S. 92 (1921)

[11] *U.S.* v. *Krall*, 174 U.S. 385 (1889)

[12] *Scofield* v. *National Labor Relations Board*, 394 U.S. 423 (1969)

[13] Petition for Writ, *Morelock et al.* v. *NCR Corp.*, pp. 10, 11

of the Supreme Court's sustaining the right to jury trial in *Lorillard,* the *Morelock* jury will persist as an advisory one, given the allegedly distinguishing element, the joinder of multiple equitable claims for relief in *Morelock.*

III. A QUESTION OF SUBSTANCE

Respondent urges that a question of substance is presented only when the Supreme Court is in a position to finally resolve the issue of "who wins and who loses". Were that the case, remand from the Supreme Court back to the circuit courts or trial courts for further proceedings would never occur, as it most frequently does.

To the degree this specious "ultimate outcome" argument is relevant to the question of whether Writ should or should not issue, we observe that a jury verdict of liability has already been returned in this case against the Respondent.

The "ease" with which that verdict may be ignored as the work of an advisory jury, turns to "consummate difficulty" upon acknowledgment of jury trial as a matter of right.[14]

Respondent's citation, *F.T.C.* v. *American Tobacco*[15], was in fact accepted for review. The Circuit Court's decision was affirmed upon that review in keeping with the "rule of non-interference where conclusions on a matter of fact depend on appreciation of circumstances which admit of different interpretations." 274 U.S. 543, 544.

The troublesome *fact issue* in that case was whether the defendant "became party to the unlawful combination of

[14] See *Sentilles* v. *Inter-Caribean Shipping Corp.*, 361 U.S. 107, 4 L.ed 2d 142, 80 S. Ct. 173

[15] *F.T.C.* v. *American Tobacco Co.*, 274 U.S. 543 (1973)

tobacco jobbers at Philadelphia to maintain prices?" 274 U.S. 543, 544.

In stark contrast, the issue at hand in *Morelock* is Constitutional, not factual. The *Morelock* decision, moreover, has created a conflict with two Federal Circuit Courts of Appeal on that very Constitutional issue.

NLRB v. *Pittsburgh S.S. Company*[16] likewise was an instance wherein the review of fact issues were held to be left normally and primarily to the Circuit Courts of Appeal under the express Congressional direction in Taft-Hartley, sec. 10 (e), 61 Stat. 148, 29 U.S.C. (Supp. III) sec. 160 (e). Respondent's citations involve neither a Constitutional issue nor a conflict among the Circuit Courts of Appeal.

IV. CONFLICT AMONG THE CIRCUIT COURTS OF APPEAL

Respondent seemingly urges at page 8 of the Brief in Opposition that right to trial by jury varies whether age discrimination is imposed under the mechanism of a pension plan versus the mechanism of a non bona fide seniority system and thereby attempts to absolve the Third Circuit's *Roger's decision* of any conflict with *Morelock.*

The *Lorillard-Morelock* conflict is absolved in equally superficial fashion by failure to perceive the obvious contradiction between the Sixth Circuit's rendering of the *Morelock* jury's verdict to the nothingness of an "advisory finding", with the Fourth Circuit's grant of jury trial as a matter of Constitutional right.

[16] *NLRB* v. *Pittsburgh S.S. Company,* 340 U.S. 498, 502 (1951)

CONCLUSION

Because of the decision's clear conflict with *Pons* v. *Lorillard,* 549 F. 2d 950 (C.A.4) (certiorari granted 5-27-77, 45 U.S. Law Week 3840); its clear conflict with *Rogers* v. *Exxon,* 550 F. 2d 834 (C.A.3); and the very real prospect that a decision in that already accepted 4th Circuit case will not resolve the entire conflict now clouding relief under the Age Discrimination in Employment Act, the Petition for Writ of Certiorari to the Sixth Circuit Court of Appeals should be granted.

Respectfully submitted,

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